Administrative procedure

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DOI: https://doi.org/10.24921/2018.94115924

Originally published at:
Uhlmann, Felix (2018). Administrative procedure. In: Thommen, Marc. Introduction to Swiss Law. Berlin: Carl Grossmann Verlag, 219-244.
DOI: https://doi.org/10.24921/2018.94115924

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Administrative Procedure[1]

1 This chapter is an updated version of a treatise previously published by the author, see Felix Uhlmann, The principle of effective legal protection in Swiss administrative law, in: Zoltán Szente/Konrad Lachmayer (Ed.), The Principle of Effective Legal Protection in Administrative Law, A European Comparison, London 2017, pp. 304.

I. Legal Sources

1. Historical Developments

The Swiss Constitution of 1874 guaranteed only a limited range of procedural rights (for example, the right to be sued at one's home court). It should be noted that it also guaranteed a narrow range of substantive fundamental rights. However, over the course of the 20th century, the Swiss Federal Supreme Court developed many procedural guarantees, such as the right to be heard and other principles of effective legal protection.[2] The legal basis which the court relied on to develop these rights was the equal protection clause.[3]

Shortcomings of legal procedure at that time typically involved a deficit in independent judicial control. Many Swiss cantonal and federal rules only granted limited access to courts in administrative matters. The typical legal recourse involved an appeal to the hierarchically higher administrative body, including the Federal Council or the executive of the cantons.[4] Appeals to the Swiss Federal Supreme Court were possible in some cases and excluded or reduced to a review with very limited scrutiny in others. The Swiss system which did not permit access to independent and full judicial review in administrative matters was incompatible with the European Convention of Human Rights (ECHR) as far as its protection of "civil rights" was concerned. Such civil rights included matters that were considered "administrative" under Swiss law such as disputes concerning bar exams; the withdrawal of a professional licence; disputes on the use of public grounds by private parties for economic aims; or claims for damages and satisfaction based on state liability. Switzerland therefore had to extend judicial control. Such developments,

2 Regina Kiener/Bernhard Rütsche/Mathias Kuhn, Öffentliches Verfahrensrecht, 2nd edition, Zurich/St. Gallen 2015, n. 35.

3 Ulrich Häfelin/Georg Müller/Felix Uhlmann, Allgemeines Verwaltungsrecht, 7th edition, Zurich/St. Gallen 2016, n. 576; BGE 134 I 23, consideration 9.1.

4 René Rhinow/Heinrich Koller/Christina Kiss/Daniela Thurnherr/Denise Brühl-Moser, Öffentliches Prozessrecht, Grundlagen und Bundesrechtspflege, 3rd edition, Basel 2014, n. 412.

among other factors, led to the framework of the current Swiss Constitution and to a reform of the Swiss judicial process.[5]

2. Constitutional Framework

The Swiss Constitution[6] dedicates three Articles to the codification of procedural rights: Articles 29, 29a, and 30. Articles 29 and 30 Constitution concern rights *within* a certain procedure and Article 29a Constitution that was introduced later on and has been in force since 1 January 2007 stipulates a right to (judicial) proceedings. Together, these provisions are the cornerstone of legal protection of due process in Switzerland. They are part of the framework of fundamental rights guaranteed by the Swiss Constitution.

Article 29 Constitution sets out the general procedural guarantees which apply in Switzerland:

> *"Every person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time."*

These guarantees apply in any proceedings, whether they are administrative or in court, concerning civil, criminal, constitutional, or administrative matters. Article 29 Constitution also explicitly establishes that these procedural guarantees encompass fundamental rights such as the right be heard (II) or the right to legal aid (III). It also includes the term "fair treatment" that allows the courts to further develop procedural rights.

Article 30 Constitution requires that specific additional guarantees must be met in judicial proceedings. According to this provision, a court must be legally constituted, competent, independent, and impartial. Its hearings must be open to the public and judgements shall be made public[7].

Article 29a Constitution sets out the conditions for access to court:

5 Rhinow et al., n. 419; see also Thomas Fleiner/Alexander Misic/Nicole Töpperwien, Constitutional Law in Switzerland, Alphen aan den Rijn 2012, p. 107.

6 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution www.admin.ch (https://perma.cc/M8UJ-S369).

7 The law may restrict this guarantee and does particularly so in administrative matters. Hence, parties requesting hearings typically rely on Article 6 ECHR.

> *"In a legal dispute, every person has the right to have their case determined by a judicial authority. The Confederation and the Cantons may by law preclude the determination by the courts of certain exceptional categories of case."*

The term "legal dispute" must be defined by relevant procedural law and constitutional practice. Only the law itself may restrict access to court. The Constitution establishes that this may only be done in exceptional circumstances. Article 29a Constitution was clearly inspired by Article 19 IV of the German *Grundgesetz* (*Rechtsweggarantie*).[8]

The Constitution remains silent on the question of the scope of judicial review. Article 29a Constitution is generally understood as guaranteeing only a single, first instance review of the facts and of the law by a court. The right to appeal, especially the right to appeal to the Swiss Federal Supreme Court, cannot be deduced from Article 29a Constitution. However, this right is often guaranteed by more specific provisions of the Constitution such as the right to appeal in penal matters (Article 32 Constitution) or the general (but not universal) right to access the Swiss Federal Supreme Court (Article 191 Constitution). It is also unequivocal that an (administrative) court may not review questions of administrative discretion;[9] this is not a matter that comes under Article 29a Constitution's guarantee of a review of the facts and the law.

3. Federal Act on Administrative Procedure and Cantonal Laws

Specific regulation on administrative procedure is laid down in federal and cantonal legislation. The Administrative Procedure Act[10] is relevant for administrative decisions of the federal authorities. It is also relevant in part for the Swiss Federal Administrative Court. There are also acts on the Swiss Federal Administrative Court[11] and the Swiss Federal Supreme Court.[12]

8 Article 19 IV Grundgesetz reads, in its English translation, as follows: *"Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts.* [...]."

9 Rhinow et al., n. 1120.

10 Federal Act on Administrative Procedure of 20 December 1968, SR 172.021.

11 Federal Administrative Court Act of 17 June 2005, SR 173.32.

12 Federal Supreme Court Act of 17 June 2005, SR 173.110.

The Swiss cantons have their own codes of administrative procedure. These codes are applicable not only to cantonal acts based on cantonal law but also to cantonal acts which apply federal law (or which apply both cantonal and federal law). Many federal laws are implemented by the cantons (e.g. spatial planning, traffic safety, migration). Although the cantons are not legally required to adhere to definitions in federal law such as the definition of an administrative act (or the consequences for legal protection that follow from the federal approach), there are no noticeable definitional differences of an administrative act in cantonal law. Hence, the definition of administrative acts is virtually the same in both federal and cantonal procedures. In many other aspects, federal and cantonal acts on administrative procedure are quite likewise.

II. Procedural Rights and Principles

1. Administrative Action

In Switzerland, legal protection from administrative action is traditionally linked to the nature of the administrative action. Administrative action carried out in the form of administrative decisions, also called rulings (*Verfügungen, decisions, decisioni*), typically trigger legal protection, either from the administration or the courts, or sometimes from both.[13] Under federal law, an administrative decision must be notified to the parties in writing. It *"must state the grounds on which* [*it is*] *based and contain instructions on legal remedies"* (Article 35 I Administrative Procedure Act).

This leads to the question of what kind of administrative action must be clothed in the form of an administrative decision. The answer is that administrative decisions must be issued where the administration's actions determine the rights and obligations of private individuals. This was explained in the chapter on Administrative Law.[14]

Article 5 Administrative Procedure Act is the relevant provision for the definition of administrative decisions. This Article also specifies that enforcement measures, interim orders, decisions on objections, appeal decisions etc. fall under the scope of this clause. It may be that an administrative decision is simply declaratory, clarifying the extent, existence, or non-existence of public law rights or obligations (e.g. confirming that a certain business practice is within the boundaries of the laws on environmental protection). Such a declaratory ruling must be issued if the applicant has an interest that is worthy of protection.[15]

The link between administrative decisions and legal protection for individuals illustrates why private parties are looking for – or in the words of one

13 Kiener/Rütsche/Kuhn, n. 1245; see Fleiner/Misic/Töpperwien, p. 284.

14 See pp. 204.

15 See Article 25 II Administrative Procedure Act.

scholar, *"hunting for"*[16] – this specific form of administrative action. Other types of state action not clothed in the form administrative decisions are real acts (*Realakte, actes matériels, atti materiali*). They encompass acts such as teaching in schools, treatments in hospitals, police action, public information etc. Legal protection against such acts was traditionally weak. People could rely on state liability claims but this presented disadvantages.[17] Thus, the federal legislator introduced Article 25a Administrative Procedure Act in order to improve legal protection: this provision establishes that everyone with an "interest worthy of protection"[18] may require that an administrative decision is taken on real acts.

The Swiss cantons are not bound by the new Article 25a Administrative Procedure Act within their own domain. In practice, cantons have taken a variety of responses to the introduction of this Article. In some cases, they have copied the provision; in others they have either opted to enact their own independent solutions (such as allowing for a direct appeal against real acts) or made no change at all. It is disputed whether the latter is still permissible under Article 29a Constitution: this provision guarantees judicial protection in any legal dispute and arguably, in those cantons which have still introduced no change, there is currently only limited legal protection available against real acts. The Swiss Federal Supreme Court has not yet made a ruling on this issue.

2. Right to be Heard

As explained above, when administrative bodies act through an administrative decision, a number of procedural rights are triggered.[19] The most important guarantee is the right to be heard.[20] It applies in administrative and court proceedings.

16 Sergio Giacomini, Vom „Jagdmachen auf die Verfügung" – Ein Diskussionsbeitrag, Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 1993, p. 237, p. 239.

17 Uhlmann, p. 307.

18 See BGE 121 I 87, consideration 1b.

19 For simplicity, the following quotations only contain constitutional federal law. The legal situation in the cantons is very similar, partly because of the compulsory nature of constitutional law, partly because of the example set out by federal law.

20 Fleiner/Misic/Töpperwien, p. 255.

The right to be heard encompasses the right to access relevant documents, the possibility to propose witnesses and other means of evidence, and the right to be informed of the possible administrative decision beforehand etc. As mentioned before, the right to be heard is granted by the Swiss Constitution. Procedural law and court practice further concretize the right in specific situations, as well as providing for restrictions on the right in cases which involve relevant third party interests (e.g. business secrets) or state interests (e.g. state security). The imposition of such restrictions often necessitates the striking of a fair balance between differing interests. If a restriction is necessary, courts will try to summarize the content of the document for the relevant party in order to allow a fair discussion on the relevant facts of the case. The court itself usually has access to all documents – cases where documents have not been released to the courts are extremely rare.[21]

Although access to documents is probably the most important aspect of the right to be heard, it should be noted that the scope of this right goes much further. The right may also be violated if relevant evidence is rejected by the court, for example the refusal to hear witnesses (although note that witness hearings are relatively rare in administrative cases) or the refusal to admit expert evidence. The court must also effectively take the private parties' arguments into account. If a decision has already been taken before considering the parties' arguments, the right to be heard is clearly violated. Further, only when the authorities give oral or written reasons for their decisions can the person concerned determine whether his or her argument has been heard or taken into account. In the authority's decision, it must also deal with the private parties' arguments, although this may be done briefly. The reason for the decision must also be sufficiently clear in order to allow an appeal.

The right to be heard also demands that the administrative process is sufficiently transparent. The authority must make it very clear when it is acting through the form of an administrative act. This means that the private parties know when the process has ended; and if no administrative act has been issued they will also know that the process is still ongoing. This obligation goes hand in hand with the duty of the authority to be transparent about the

21 A notorious example involved constructions plans on nuclear weapons that the Federal Council, i.e. the federal government, ordered to be destroyed during ongoing criminal proceedings; see the investigation of the Swiss Parliament (Fall Tinner, Rechtmässigkeit der Beschlüsse des Bundesrats und Zweckmässigkeit seiner Führung, Bericht der Geschäftsprüfungsdelegation der Eidgenössischen Räte vom 19. Januar 2009 [Federal Gazette No 27 of 19 January 2009, p. 5007]).

process and the possible measures it intends to use. The authority is not permitted to be unduly vague about its actions nor may it "surprise" the private parties with the procedure it follows. The latter point is illustrated by a recent decision of the Swiss Federal Supreme Court: The local authorities had invited individuals who had applied to be naturalised to an informal "get-to-know" session. They had not made it clear that they planned to test the applicants on their knowledge of Swiss culture, history, and more at this meeting. The Federal Supreme Court considered that although it is acceptable to expect naturalization applicants to have a basic knowledge of Switzerland, it is not acceptable to test that knowledge without first giving them proper notice.[22] This case also shows that the right to be heard is a flexible instrument that the courts can utilise to intervene against any form of administrative process that does not appear fair.

3. Right to a Decision Within Reasonable Time

A fair process also includes the right to have a decision taken within a reasonable time (Article 29 Constitution). If the authority does not act within a reasonable time, an appeal may be filed at any point. The reasonableness must be determined in light of all circumstances of the case. The authority may consider the complexity of the case, the urgency of the matter, and the behaviour of the parties. However, any internal issues of the relevant authority, i.e. shortage of personell, are certainly not valid grounds for delay.

4. Right to Legal Aid and to Counsel

A last important aspect of the overall fairness of the procedure is the right to legal aid.[23] The right to legal aid and to the assistance of a legal counsel if necessary is clearly guaranteed by Article 29 III Constitution:

> *"Any person who does not have sufficient means has the right to free legal advice and assistance unless their case appears to have no prospect of success. If it is*

22 BGE 140 I 99, considerations 2 and 3.

23 Fleiner/Misic/Töpperwien, p. 256.

necessary in order to safeguard their rights, they also have the right to free legal representation."

The aid can only be granted if a reasonable person would consider the case to have a sufficient chance of success. The need for legal counsel depends on the complexity of the matter and the abilities of the private party: if that person may represent him or herself without great difficulties before the relevant authority, the request for free legal representation will be denied. If the parties are covering the costs of legal representation themselves, it is possible to be represented. However, there is no obligation to employ a lawyer or another specialist. Generally, there are no procedures in Swiss administrative law in which legal representation is compulsory. There are very few exceptions, where the respective authority may order that the parties must appoint one or more representatives (e.g. Article 11a Administrative Procedure Act). In cases involving administrative and constitutional law, parties may (even before the Swiss Federal Supreme Court) be represented by anybody with capacity to act.

5. Right to Appeal

As previously discussed,[24] the form of an administrative decision implies that there is a legal remedy available against that decision. The administrative decision must contain instructions on the available legal remedies. Depending on the relevant administrative procedure, the appeal may go directly to a court or instead first to a higher administrative authority and then to a court. Exceptions from legal recourse must be clearly stated in the law and are restricted to exceptional cases. In practice, these exceptions concern highly political matters, for example the issuing of a permit to build a nuclear power station or matters of national security (Article 32 I lit. a and e Administrative Court Act). Some other exceptions concern technical matters or matters that seem little suited for court decisions such as financial bonuses for civil servants (Article 32 I lit. c Administrative Court Act). Overall, the exceptions are narrowly circumscribed by the legislator, as demanded by the Swiss Constitution.

24 See pp. 225.

Matters are more complicated if third parties intervene. Whether they are granted a right to appeal largely depends on the way the term "party" is defined. Any party to the procedure may launch an appeal (and has the right to participate in the proceedings from the very beginning). The Administrative Procedure Act defines parties, i.e. the holders of the procedural rights, in terms of their material interest in participating: *"Parties are persons whose rights or obligations are intended to be affected by the ruling."*[25] A similar wording is used for the definition of *locus standi* in an appeal. The right to appeal is granted to anyone that is *"specifically affected by the contested ruling"* and *"has an interest that is worthy of protection in the revocation or amendment of the ruling"* (Article 48 I Administrative Procedure Act). Participation in the first-instance proceedings is generally a requirement for a party to possess the legal standing to lodge an appeal. Typical third parties are neighbours and – more restricted – competitors.

6. Right to Challenge Legislation

Most legislation can be challenged in a concrete case before a court (or before an administrative body). A court will then proceed to conduct a two-tier review. First, it will examine whether the normative basis is legal (*vorfrageweise, inzidente, konkrete Normenkontrolle*). If this test is met, the court further examines whether the law was applied correctly.[26]

Article 190 Constitution noticeably prevents judicial review of legislation, requiring that federal laws be applied even in the case that the court finds the law unconstitutional.

A direct challenge of legislation (*abstrakte, direkte Normenkontrolle*) is possible where cantonal laws and ordinances are at issue. The latter includes internal normative acts (*Verwaltungsverordnungen*) if these affect private parties and their review proves to be impossible or impractical in a concrete case.[27] The cases that challenge cantonal laws are typically decided directly by the Swiss Federal Supreme Court if there is no legal remedy at the cantonal level. The Swiss Federal Supreme Court may quash cantonal laws, thus rendering them fully or partially invalid. Even if the court does not invalidate cantonal

25 Article 6 Administrative Procedure Act also states that *"other persons, organizations or authorities who have a legal remedy against the ruling"* are parties.

26 Rhinow et al., n. 707 et seq.

27 BGE 128 I 167, consideration 4.3; BGE 122 I 44, consideration 2a.

legislation, it may give important guidelines for the cantonal authorities how to apply the law in order to stay within the constitutional boundaries. This was e.g. the case for police legislation from Zurich. Cantonal constitutions are not subjet to judicial control as they must be approved in a procedure by the Swiss Parliament (Article 51 II and 172 II Constitution).[28] There is no direct challenge against federal laws and ordinances.

The legal standing for challenging cantonal legislation exists in a far broader manner than in cases concerning administrative decisions. A person may challenge legislation if she or he can claim that there is a possibility – even if a remote one – that she or he will be affected by the act (*virtuelles Betroffensein*).[29] An appeal against legislation itself does not preclude an individual from later invoking a legal remedy against an individual administrative decision, which applies the law. In this respect, a cantonal law may be challenged twice: first in abstract terms regarding how the act could be applied and later regarding how the act was actually applied in a concrete case.

28 Kiener/Rütsche/Kuhn, n. 1780.

29 Kiener/Rütsche/Kuhn, n. 1740.

III. Institutional Framework

1. Administrative Authorities

The administrative authorities themselves play a vital role in providing effective legal protection in administrative law. As was briefly explained above,[30] before the introduction of the current Swiss Constitution often only hierarchically higher administrative bodies were competent to grant legal protection against action taken by bodies lower in rank. This was problematic regarding the fact that these superior bodies were not institutionally independent. However, it is important not to underestimate the level of protection these bodies offered. First, these bodies, often affiliated with the office of Justice of the canton or at the very least staffed with qualified lawyers, developed high standards of judicial protection. Secondly, the superior administrative bodies are usually well aware of the daily work of the lower units, hence strengthening administrative oversight. Finally, administrative control within the public administration has the practical advantage of allowing full scrutiny: whereas courts typically do not review questions of administrative discretion, supervisory administrative bodies show less if any restraint.[31]

The Swiss cantons also execute a substantial amount of federal law: the typical legal recourse against such action first involves going to the hierarchically higher administrative bodies. This can potentially encompass up to three instances, including a review by the cantonal executive.[32] Following this, the applicant may turn to the cantonal administrative courts. These courts must uphold Article 29a Constitution meaning that they must at least conduct a full review of questions of law and facts. After a review by the cantonal administrative courts, most cases can be taken to the Swiss Federal Supreme Court (*Bundesgericht, Tribunal fédéral, Tribunale federale*). The Swiss Federal Supreme Court typically only reviews questions of law.[33]

30 See pp. 221.

31 Kiener/Rütsche/Kuhn, n. 13.

32 Kiener/Rütsche/Kuhn, n. 42.

33 See the grounds for appeal in Articles 95 et seq. Federal Supreme Court Act.

Administrative acts of the federal administration can be taken to the Swiss Federal Administrative Court (*Bundesverwaltungsgericht, Tribunal administratif fédéral, Tribunale administrativo federale*). Judicial control by a higher administrative body is the exception rather than the rule for action taken in the federal system. However, it does have some practical significance in areas that are excluded from judicial protection such as measures to safeguard internal security; in these cases, control may be partly exercised by the Swiss Federal Council. According to existing legislation, the Federal Administrative Court reviews questions of law, facts, and administrative discretion. However, judicial practice over time has led to the courts typically exercising some restraint in the latter area; part of the rationale here is that cases involving administrative discretion often require specialised technical understanding, or knowledge of the local circumstances or subjective factors (for example, this may be the case for administrative decisions regarding exams).[34] As a general rule, decisions of the Swiss Federal Administrative Court may be challenged before the Swiss Federal Supreme Court. However, some subject matter areas such as cases on immigration and asylum, exams, and subsidies are fully or partially excluded from Federal Supreme Court review (Article 83 lit. c and t Federal Supreme Court Act), hence rendering the Federal Administrative Court the court of last national instance.

2. Courts

As highlighted above, judicial control by the courts is a constitutional guarantee under Article 29a Constitution. Hence, most administrative acts may be challenged before an administrative court directly (like the acts of the federal administration) or indirectly via recourse to higher administrative bodies (e.g. acts of the cantonal administration).[35] The law may only *"preclude the determination by the courts of certain exceptional categories of case"* (Article 29a Constitution).

The most important restriction on judicial control in Switzerland is not one of the previously outlined exceptions; it is Article 190 Constitution. According to that provision, the *"Federal Supreme Court and the other judicial authorities apply the federal acts and international law"*. As a consequence of this provision, the constitutional review of federal laws is not permitted, or more

34 Häfelin/Müller/Uhlmann, n. 444.

35 See, for an overview, Fleiner/Misic/Töpperwien, p. 110.

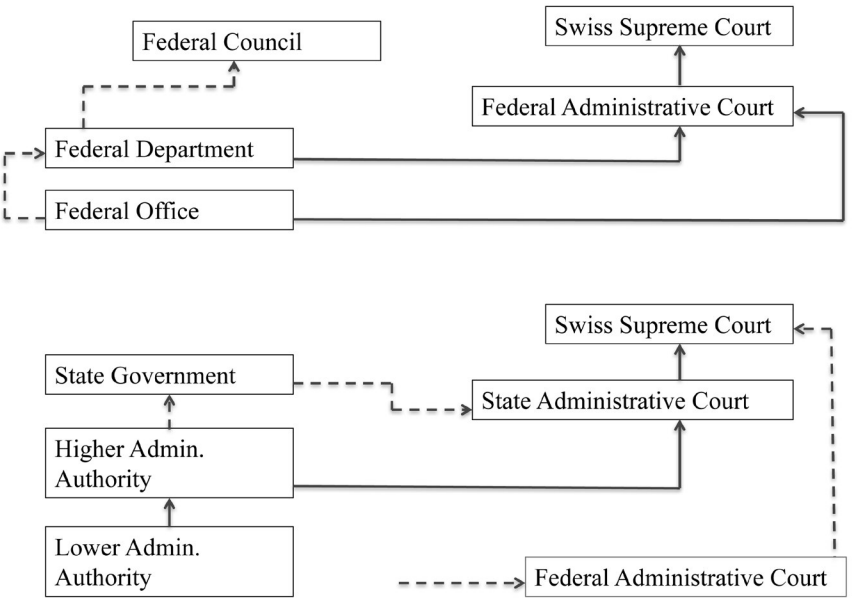

Figure 1: *Appeal System before Cantonal (State) and Federal Authorities*[36]

precisely, Swiss courts must apply federal laws even if they are considered to be unconstitutional.[37] Judicial practice has carved out some exceptions to court abstinence, such as in the case of federal laws, which violate the ECHR. The Swiss Federal Supreme Court will not apply a federal law in conflict with the ECHR. Still, a substantial part of federal legislation is not subject to court nullification in the case of a violation of the Constitution. Swiss cantons, e.g., cannot sue the federal government for overstepping its competences if federal action is based on federal law.

The rationale behind Article 190 Constitution is that the last word on questions of constitutionality should not be given to a court but to the legislator itself, as this is the authority with the highest degree of democratic legitimation. The federal legislator is not above the Constitution but above constitutional control; it is officially bound by the Constitution and must respect it. This means that the federal Parliament itself must decide upon questions of the constitutionality of federal laws – which it regularly does, supported by the

36 Uhlmann, p. 313.
37 Kiener/Rütsche/Kuhn, n. 1763.

expert opinion of the Federal Department of Justice. Several attempts by the Swiss government to abolish Article 190 Constitution have failed; Parliament has thus far refused to allow a shift in power to the courts, which in my view is regrettable.

Notably, Switzerland does not have a special constitutional court. Instead, constitutional questions may be decided by every Swiss court including cantonal courts and courts that decide upon civil or penal matters. In concrete cases, constitutional questions may even be decided by administrative bodies. Hence, Switzerland has opted for a so-called "diffuse" system of constitutional review,[38] closer to the US court system than to the German model of concentrated constitutional review.

According to the Administrative Procedure Act, *"[t]he appellate authority shall itself make the decision in the case or in exceptional cases shall refer the case back to the lower instance and issue binding instructions"* (Article 61 I Administrative Procedure Act). A referral back to the lower instance administrative authority is typically made if further fact-finding has to be done by the lower instance or if the lower instance may use its discretion to decide the case.[39]

Both appellate administrative authorities and the courts may grant interim relief. Typically, an appeal automatically has suspensive effect.[40] As the Administrative Procedure Act declares, a court may also take *"other precautionary measures* [...] *to preserve the current situation or to temporarily safeguard interests that are at risk"* (Article 56 Administrative Procedure Act). Swiss courts typically approach the question of whether to grant suspensive effect or precautionary measures by conducting a balancing test between the interests of the state and those of private parties. If they believe that the eventual result of the case is clear, they also may take the probable outcome into account in considering the granting of such measures.[41] Such decisions are often of great practical importance: cases on public procurement often do not continue once the public authority has legally concluded the contract with its chosen private partner; if the suspensive effect is denied, the claimants may only recover their costs from the procedure but not conclude the contract.

38 Kiener/Rütsche/Kuhn, n. 1719.
39 Kiener/Rütsche/Kuhn, n. 1649 et seq.
40 For details see Rhinow et al., n. 680 et seq.
41 Kiener/Rütsche/Kuhn, n. 1330.

3. Other Bodies and Procedures

In the federal system, special committees which serve as courts have been abolished, with the exception of the Independent Complaints Authority for Radio and Television. The committees have been replaced by the Federal Administrative Court which is competent in all matters decided by the federal administration.[42] In the cantons, special committees still exist, most notably in the areas of construction, taxes and culture.[43]

In some cantons, the institution of the Ombudsman has some practical significance.[44] On the federal level, an initiative to introduce the Ombudsman failed. There are however two independent, personalised functions of control of state-regulated prices (*Eidgenössischer Preisüberwacher*) and of data protection and transparency of the public administration (*Eidgenössischer Datenschutz- und* Öffentlichkeitsbeauftragter*, EDÖB*). Both may resort to the use of legal remedies but the most efficient tools available to them are negotiation with the administration and informing the public on its rights. The "EDÖB" may also initiate legal proceedings against private parties; he has done so in an important case against Google (google street view)[45].

Another route through which parties can challenge administrative action is Alternative Dispute Resolution (ADR), recently introduced into the Administrative Procedure Act. Article 33b I Administrative Procedure Act establishes that the court *"may suspend the proceedings with the consent of the parties in order that the parties may agree on the content of the ruling"*. It may encourage the parties to reach an agreement by appointing a neutral mediator. The provision has not been in force long enough to make any useful comment on its practical consequences.

4. European Perspective

As Switzerland is not a member of the EU, EU law is not directly applicable in Switzerland. However, it may be relevant due to the bilateral treaties or due to an autonomous decision by the Swiss authorities to implement EU law

42 Rhinow et al., n. 787 et seq. and 1416.
43 Kiener/Rütsche/Kuhn, n. 1402.
44 Häfelin/Müller/Uhlmann, n. 1768 et seq.
45 BGE 138 II 346.

(*autonomer Nachvollzug*).[46] EU law is largely irrelevant in terms of the substantive legal protection available in Switzerland; the procedure is predominantly dictated by domestic Swiss law.

Switzerland is currently in the process of negotiating an institutional agreement to ensure the more consistent and efficient application of its present and future agreements with the EU. If Switzerland can conclude such an institutional agreement with the EU, questions of jurisdiction would be a core element. An agreement would clearly influence the administrative process in matters involving EU law. However, negotiations do not appear likely to come to a successful end any time soon.

In contrast, the legal protection now available in administrative matters has certainly been influenced by the jurisprudence of the European Court of Human Rights, namely to grant court review in administrative matters. As explained above, it was deemed insufficient for protection from the administration to only encompass "civil matters"; it is necessary for such protection to also apply to areas technically falling under Swiss administrative law. The European Court of Human Rights is still influencing administrative procedure in Switzerland, recently for example in cases, which concern the right to reply. The Swiss Federal Supreme Court has now shaped a practice that seems to be consistent with European Court of Human Rights requirements: all documents submitted in court procedures must be forwarded to the parties.[47] In administrative procedures this requirement extends to all relevant documents submitted to authorities and courts.

46 See the chapter on International Relations, pp. 165.

47 See BGE 137 I 195.

IV. Landmark Cases

1. Necessity of Issuing an Administrative Decision: IWB [48]

X was a tenant in a Basel property. For two years, its owner has not paid the bills for the general electricity supply of the building issued by the canton of Basel-Stadt industrial works (*Industrielle Werke des Kantons Basel-Stadt*, IWB). In a letter of formal notice to the owner, IWB announced that it would stop electricity supply should the outstanding amount not be paid in a certain period of notice. The owner allowed the period to expire without paying. Then, IWB informed the tenants of the property about the upcoming supply stop via ordinary (i.e. non-registered) mail dated 9 April 2008. Energy supply was then stopped between 23 April and 30 May 2008, for the elevator and hot water boiler. After IWB was informed about a pregnant woman living in the property, it resumed electricity supply.

Acting on behalf of X, the Basel tenants' association appealed before the superior administrative body (the Building Department) on 29 May 2008. On 14 July 2008, the Department dismissed – i.e. it did not consider on the merits – the request to resume supply since the stop was already rescinded and rejected the prayer for compensatory relief. X unsuccessfully challenged this decision before the cantonal government (the *Regierungsrat* of the canton of Basel-Stadt) and, subsequently, before the Appellate Court of the canton of Basel-Stadt.

X brought the case before the Swiss Federal Supreme Court, claiming that his constitutional right to be heard was violated because the supply stop was not issued in the form of an administrative act and he was not granted the right to take position on the planned measure beforehand although being tenant of the property.

48 BGE 137 I 120.

The Court emphasized that IWB is legally obliged to supply electricity. According to the statutory law, supply may only be refused contingent, inter alia, if it does not constitute unreasonable hardship for third parties such as the owner's tenants. Hence, the Court reasoned that ordering such refusal interferes with the tenants' rights. The order thus qualifies as administrative act and must be issued as such rather than as real act. Consequently, not only property owners but also tenants and other affected persons must be heard beforehand and be granted the right to express their objections against the admissibility of the planned supply stop (in particular with respect to the unreasonable hardship imposed on them). With respect to the information letter of 9 April 2008, the Court held that it was no sufficient basis for laypersons to exercise their rights. Hence, the Court found that X's right to be heard was violated.

2. Procedural Fairness: Naturalisation[49]

Spouses A and B as well as their children C and D applied for citizenship in the municipality of *Weiningen* (canton of Zurich). With letter dated 8 October 2012, the municipal Naturalization Commission invited the family for a conversation which, according to the invitation letter, should serve the purpose of getting to know the applicants and their motivation for the naturalization process. In reality, however, the Commission assessed the suitability of the applicants for citizenship. In the following, the municipality rejected their application on the grounds that they are not well integrated into Swiss lifestyle; lacked command of the German language; and could not answer simple geographical and civic questions. A, B, C, and D unsuccessfully challenged this decision before the District Council (*Bezirksrat*), i.e. the hierarchically higher administrative body, and, subsequently, the Administrative Court of the canton of Zurich.

Before the Swiss Federal Supreme Court, A, B, C, and D argued that their right to fair treatment (Article 29 I Constitution) was violated by being invited to a personal interview and, instead, unexpectedly being examined.

The Court found that procedural guarantees of the Constitution apply in the naturalization process, namely the right to be heard (Article 29 I Constitution) as one aspect of procedural fairness, which also entails the right to receive

49 BGE 140 I 99.

information on the formal and substantive prerequisites of the naturalization process. The Court also stated that according to the principle of good faith (Article 5 III Constitution), parties could expect the state not to deviate from the announced course of proceedings without prior notice.

Further, the Court stated that it is within the municipal discretion to ask questions on general knowledge at *some* point during the naturalization process; however, because of the early stage of the proceedings and the invitation letter, A, B, C, and D could legitimately expect that such examination would take place later on rather than during the (early) personal interview and that they could prepare beforehand. Consequently, the Court held that the municipality violated the right to fair proceedings and to be heard, respectively, as well as the principle of good faith.

Due to the formal nature of the right to be heard, the Court repealed the challenged decision and referred the case back to the municipality for further fact finding and in order to adopt the required procedural steps.

As already stated above, this case also shows that the right to be heard is a flexible instrument that the courts can utilise to intervene against any form of unfair administrative process and that is not restricted to certain case groups. It is important to note that Article 29 Constitution applies to *all* state proceedings in civil, penal, and public law within which a decision on individual rights and duties is rendered, be it before Courts or non-judicial bodies including the government and parliament.[50]

3. Direct Challenge of Legislation: Police Act of Zurich[51]

On 5 July 2006, the Parliament of the canton of Zurich adopted the Police Act (*Polizeigesetz*), a cantonal law which was subsequently approved by the voters. The adoption of the Police Act should create statutory bases for the performance of the duties and measures of the police force in order to maintain public order and safety. Private persons, a lawyer's association, and political parties challenged the Police Act directly before the Swiss Federal Supreme Court (*abstrakte, direkte Normenkontrolle*), claiming that various

50 See also Giovanni Biaggini, Kommentar Bundesverfassung der Schweizerischen Eidgenossenschaft, 2nd edition, Zurich 2017, Article 29 n. 3.

51 BGE 136 I 87.

provisions violate the Federal Constitution, the European Convention on Human Rights (ECHR), and the International Covenant on Civil and Political rights (ICCPR).

In general, the Court reasoned that it is crucial for the constitutionality of cantonal legislation whether it is possible to interpret the cantonal provision in a way that is consistent with the constitutional guarantees invoked.

It is important to note that whereas the Court can only decide on whether to rescind or uphold the challenged legislation, its considerations predetermine the future (constitutional) application of the Police Act: The authorities must act according to the restrictions set out in the considerations of the Court when applying the Police Act in the future, otherwise administrative acts or real acts based on the Police Act will be quashed if challenged.

The Court then examined the procedural aspects of the police custody-regime in relation to the provisions concerning the requirements for taking a person into police custody. As the Police Act did not entail any provisions on the legal protection, the general rules of legal protection in the canton of Zurich applied, i.e. the affected person had to challenge the custody before the superior administrative body. Only after having exhausted these administrative remedies an appeal to the Administrative Court of the canton of Zurich, i.e. a judicial body, was possible. The Court reasoned that Article 5 IV ECHR[52] does not bar the member states from implementing administrative control before granting access to judicial proceedings, contingent a judicial decision is rendered "speedily". However, Article 31 IV Constitution states that any person who has been deprived of their liberty by a body other than a court has the right to have recourse to a court *at any time* which shall then decide as quickly as possible on the legality of their detention. The Court reasoned that the notion "at any time" means the Court can be invoked *directly* without prior proceedings before administrative bodies. Thus, Article 30 IV Constitution goes beyond the general right to judicial proceedings according to Article 29a Constitution. As a result, the Court held that the Police Act violates Article 31 IV Constitution and requested the cantonal legislator to

52 Article 5 IV ECHR states that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

enact provisions on the legal protections that suffice under the constitutional guarantees.[53]

4. "Legal Sausage Salad" or the Importance of the ECHR[54]

On 24 February 1998, attorney-at-law R appealed against a civil law decision of a court of first instance to the High Court of the canton of Zurich. His appeal described the proceedings, the challenged decision, the opposing party, and its counsel by various improper expressions. Inter alia, he called the proceedings a *"charade"* (literally *"monkey theatre"*, *Affentheater*) and a *"legal sausage salad"*; described the statement of claim as *"ludicrous"* and *"mad-brained"*; designated the decision as *"sheer nonsense"*; called the court of first instance a *"body of a rogue state"*; and stated that the opposing counsel was *"blathering of the law"*. The High Court filed a complaint to the Supervisory Commission for Attorneys-at-Law (*Aufsichtskommission* über *die Anwältinnen und Anwälte*) which initiated a proceeding against R. Later, the (then existing) Court of Cassation of the canton of Zurich held that the High Court's decision violated the right to be heard of the party represented by R.

On 4 November 1999, the Commission imposed a fine on R and barred him from exercising his profession for three months because the expressions used in his first file were inadmissible under professional ethics and practice rules. R's appeal to the High Court was not successful. He brought the case before the Swiss Federal Supreme Court, claiming that the High Court violated Article 6 I ECHR by not carrying out a public hearing despite a corresponding request made by him. He argued that the Commission (which carried out such public hearing) did not constitute an independent court as required by Article 6 I ECHR.

Article 6 I ECHR entitles everyone in the determination of his civil rights and obligations or of any criminal charge against him to a fair and public hearing within a reasonable time by an independent and impartial tribunal

53 The Police Act was then amended by the Parliament of the canton of Zurich. Nowadays, an appeal to the Compulsory Measures Court is available.

54 BGE 126 I 228.

established by law. The Court held that disciplinary proceedings leading to professional bans concern "civil rights" within the meaning of Article 6 I ECHR.

The Court considered the Commission to be closer to an administrative body than to a court. Such finding is also supported by the case law of the ECHR that focuses on the *appearance* of the body. Consequently, the Court reasoned that the Commission acted as non-judicial body here and that a public hearing held only by such body does not meet the requirements imposed by Article 6 I ECHR and Article 30 Constitution, respectively. It referred the case back to the High Court to hold a public hearing in accordance with Article 6 I ECHR and decide again.

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